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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART,
PETITIONER,

-VS-

ANTHONY MARSHALL SPEARS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

CAPITAL CASE

The Ninth Circuit Court of Appeals panel unanimously held that, as of July 17, 1998, Arizona's amended procedures governing the appointment and compensation of post-conviction relief (PCR) counsel to indigent capital defendants satisfies the requirements to "opt in" to the expedited federal habeas procedures in Chapter 154 of the AEDPA. The Court refused to allow Arizona to enforce the expedited habeas procedures in Spears' case, however, because Arizona did not apply its normal procedure governing the timing of appointment of PCR counsel and there was a delay in appointing PCR counsel to Spears. Given that Spears never alleged or proved prejudice resulting from the delay in appointment, did the Ninth Circuit err in concluding that Arizona should be denied the *quid pro quo* benefits promised by Congress and precluded from enforcing the provisions in Chapter 154?

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OPINIONS BELOW

A three-judge panel of the Ninth Circuit accepted interlocutory review in this capital case to answer the question whether Arizona has "opted in" to the new, accelerated habeas procedures in Chapter 154 of the AEDPA. The panel issued a unanimous opinion in *Spears v. Stewart,* 267 F.3d 1026 (9th Cir. 2000), the panel slightly amended its opinion on rehearing, and the court denied en banc review in *Spears v. Stewart,* 283 F.3d 992 (9th Cir. 2002). (Appendix.) The panel reversed the district court's ruling that Arizona's amended procedures do not satisfy Chapter 154's requirements, but also found that Arizona did not apply its procedure governing the timing of the appointment of PCR counsel in Spears' case and, therefore, could not enforce Chapter 154's provisions in Spears' federal habeas proceeding. (*Id.*)

The Arizona Supreme Court's opinion affirming Spears' convictions and sentences is reported in *State v. Spears,* 908 P.2d 1062 (1996).

STATEMENT OF JURISDICTION

Petitioner respectfully requests this Court to issue a Writ of Certiorari to reverse the amended decision of the Ninth Circuit Court of Appeals denying Arizona the benefits promised by Congress in Chapter 154 of the AEDPA and to dismiss Spears' federal habeas petition as untimely under the 180-day statute of limitations in Chapter 154. The Ninth Circuit issued its amended opinion on rehearing and denied the suggestions for rehearing en banc on March 20, 2002. Petitioner timely files the Petition for Writ of Certiorari within 90 days of that decision, which is June 18, 2002. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and

Supreme Court Rule 10.

PROVISIONS INVOLVED

Chapter 154 of the AEDPA is contained in 28 U.S.C. §§ 2261-66 and provides, in relevant part:

> **§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**
>
> (a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.
>
> (b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.
>
> (c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent. . . .

. . . .

§ 2263. Filing of habeas corpus application; time requirements; tolling rules.

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a

capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

. . . .

Arizona's procedures governing the issuance of the mandate, the initiation of PCR proceedings, and the appointment of PCR counsel are also relevant. When Spears was provided PCR counsel on July 17, 1998, those procedures were as follows:

The clerk of the Supreme Court shall issue the mandate in capital cases when the time for filing a petition for writ of certiorari in the United States Supreme Court

> from the decision affirming the defendant's conviction and sentence on direct appeal has expired, or, in a case in which a petition for certiorari has actually been filed, when the clerk of the Supreme Court is notified by the United States Supreme Court that the petition has been denied.

Ariz. R. Crim. P. 31.23(b)(1). This provision is unchanged.

> In capital cases, on the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal, the clerk of the supreme court expeditiously shall file a notice of post-conviction relief in the trial court. . . . . The supreme court shall appoint counsel pursuant to section 13-4041, subsection B. All indigent state prisoners under a capital sentence are entitled to the appointment of counsel to represent them in state post-conviction proceedings. . . .

A.R.S. § 13-4234(D). This provision is also unchanged.

> Upon the filing of a timely notice in a capital case, . . . the presiding judge shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. . . .

Ariz. R. Crim. P. 32.4(c). This section was amended several times and currently allows for the appointment of PCR counsel to indigent capital defendants prior to the issuance of the mandate:

> *Capital Cases.* After the Supreme Court has affirmed a defendant's conviction and sentence in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case

> originated, shall appoint counsel for the defendant pursuant to A.R.S. §§ 13-4041 and Rule 6.8 if the defendant is determined to be indigent.

Ariz. R. Crim P. 32.4(c)(1) (effective June 1, 2002).

Finally, the provisions in Rule 31 (i.e., governing the issuance of the mandate) may be suspended in exceptional circumstances as follows:

> In exceptional circumstances, the Appellate Court, on motion of a party or on its own initiative, may suspend the requirements of any section of Rule 31, and may substitute any other appropriate order of proceedings.

Ariz. R. Crim. P. 31.20. This provision is unchanged.

STATEMENT OF THE CASE

A. Underlying Facts

Anthony Spears murdered Jeanette Beaulieu more than 10 years ago, in early January of 1992. *State v. Spears*, 908 P.2d at 1067-68. Spears lived in California with another woman, but often visited Jeanette in Arizona. *Id.* In late December 1991, Spears visited Jeanette and convinced her to obtain several cash advances on credit cards and transfer the title of her truck to him. *Id.* Shortly thereafter, he took her to a remote desert area and shot her in the back of the head. *Id.*

Jeanette's body was not discovered until approximately 2 weeks later. *Id.* Police subsequently apprehended Spears in California, driving Jeanette's truck and in possession of her other property, more than $1,000 in cash, and the 9 mm Beretta handgun he used to murder Jeanette. *Id.*

A jury convicted Spears of first-degree murder and theft. *Id.* The trial court subsequently determined that Spears murdered Jeanette with the expectation of pecuniary gain under former A.R.S. § 13–703(F)(5), now (G)(5). *Id.* The trial court also found that Spears' proffered mitigation evidence was insufficient to call for leniency and sentenced Spears to death. *Id.*

B. Direct Appeal

On automatic appeal, the Arizona Supreme Court affirmed Spears' convictions, and in its independent review of the appropriateness of the death penalty, also affirmed the sentence of death. *Id.* at 1081. Spears subsequently filed a Petition for Writ of Certiorari, which this Court denied on November 4, 1996, in *Spears v. Arizona*, 519 U.S. 967 (1996).

C. Post-Conviction Relief Proceedings

The interplay between the state PCR proceedings and the requirements of Chapter 154 is at the heart of this case. Before counsel was appointed to Spears to pursue PCR proceedings, the Arizona Legislature and Arizona Supreme Court amended the system for the appointment, compensation, and funding of PCR counsel. *See generally* A.R.S. § 13–4041; Ariz. R. Crim. P. 6.8.

As explained further herein, when the amended system was initially implemented, the Arizona defense bar refused to seek appointment until the compensation provision was increased. During that time, a backlog of about 15 capital cases, including Spears' case, developed. After the compensation provision was amended via emergency legislation and counsel began seeking appointment, PCR counsel were appointed in those cases.

Because of the initial unavailability of PCR counsel, the Arizona Supreme Court suspended the normal rules governing the issuance of the mandate and withheld the mandate until PCR counsel became available. *See* Ariz. R. Crim. P. 31.20. On the date PCR counsel became available, the Arizona Supreme Court issued the mandate, filed the notice of post-conviction relief, and appointed PCR counsel.

In the instant case, Spears was first appointed PCR counsel under the amended system on August 22, 1997, which is about 9 months after this Court denied review; and the attorney subsequently withdrew from the case. (C.R. 32 at 4 n.2.) PCR counsel was re-appointed on July 17, 1998, approximately 1 year and 8 months after this Court denied review. (C.R. 13 at 7, Exhibit E.) PCR counsel filed a PCR petition on January 28, 1999, 195 days later. (C.R. 13 at 1.) In pursuing his many claims of ineffective assistance of counsel in the PCR proceeding,

Spears' attorney never argued or even suggested that the delay in his appointment affected his ability to pursue the claims. (C.R. 32 at 5–6.) The trial court summarily denied the petition, and the Arizona Supreme Court subsequently denied review of that ruling on May 23, 2000. (C.R. 13 at 8.)

D. Federal Habeas Proceedings

1. District Court Decision and Certification of Appeal

After Spears initiated his federal habeas proceedings, Petitioner moved to dismiss the proceedings as time barred under the shortened, 180-day statute of limitations contained in Chapter 154. (C.R. 13.) Petitioner argued that Arizona's amended appointment system satisfies the requirements in Chapter 154 and that the amended system was applied in Spears' case. (*Id.*)

The Federal District Court for the District of Arizona determined that Arizona's amended mechanism did not satisfy the requirements for opting into the accelerated provisions of Chapter 154 because: (1) although the statutory standards for competency are sufficient, the appointment of competent PCR counsel is not immediate; and (2) although the $100 per hour rate of compensation is sufficient, the 200 hours statutory amount of time for which compensation will be paid is unreasonable, notwithstanding a provision allowing counsel compensation for hours in excess of 200 upon a showing of good cause. (CR 43 at 13–18, 23–26.) The district court therefore denied Petitioner's motion to dismiss the petition. Recognizing the import of the opt-in issue, the district court certified an interlocutory appeal to the Ninth Circuit.

2. Ninth Circuit Opinion

The Ninth Circuit held that Arizona's amended system satisfies the requirements to opt into the expedited procedures in Chapter 154, making Arizona the first state in the nation to have done so. *Spears*, 283 F.3d 992. The court also held, however, that Arizona did not apply all "essential particulars" of the system in Spears' case and thus could not enforce the expedited procedures against Spears. *Id.* at 1018. The *sole provision* that the court found lacking concerns the timing of the appointment of PCR counsel:

> In order to receive the benefits of Chapter 154 in a particular case, a state must achieve two things. First, the state must have in place a system that meets the federal statutory criteria for the appointment of post-conviction counsel for indigent capital defendants. Second, the state must follow that system in essential particulars. We thus agree with the Fourth Circuit that Chapter 154 requires a state to provide more than just a system that meets the federal standard on paper. Instead, a state must appoint counsel in compliance with its own system before a federal court will enforce the Chapter 154 time line on its behalf on a particular case.
>
> Here, the Supreme Court denied certiorari on November 4, 1996. Yet, post-conviction counsel was not appointed for Petitioner until July 17, 1998—a period of about one year and eight months. We read the Arizona system to have required the appointment of counsel, in a case of this kind, within fifteen days from the date on which the state issued the notice of post-conviction relief (which, in turn, was to issue once Arizona received notification of the denial of certiorari

by the Supreme Court). Because timeliness is a requirement at the heart of the post-conviction procedure, and the state failed utterly to meet the extant requirement, we hold that Arizona is not entitled to enforce the procedures of Chapter 154 in Petitioner's case.

Id. (citations omitted).

3. Petitions for Rehearing/Suggestions for Hearing En Banc

Petitioner requested rehearing and suggested rehearing en banc on the timely appointment issue, arguing that Spears had received all the benefits contemplated under the new procedures and that Arizona was entitled to the *quid pro quo* benefits promised by Congress. Petitioner pointed to Arizona Rule of Criminal Procedure 31.20, which allows the Arizona Supreme Court to suspend the normal rules governing the issuance of the mandate under extraordinary circumstances. Spears also requested rehearing and suggested a rehearing en banc.

The panel declined rehearing, but slightly amended its opinion on points that are not relevant to this petition. The court denied hearing en banc.

REASONS WHY THE WRIT SHOULD ISSUE

This case presents an important question of law that has the potential to greatly affect not only each of the 37 states that currently has capital punishment, but also each of the federal district and circuit courts of appeal encompassing those states. *See* Sup. Ct. R. 10(c). Congress enacted Chapter 154 of the AEDPA to allow States that provide capital defendants with

competent counsel in state collateral proceedings the *quid pro quo* benefit of streamlined federal habeas procedures.

Arizona is the first state in the nation to successfully amend its mechanism for appointing PCR counsel to comply with the requirements set forth in Chapter 154, and Arizona indigent capital defendants have received the benefit of the amended state system for more than 4 years. By incorrectly discerning congressional intent and misinterpreting state law governing the timing of the appointment of counsel, the Ninth Circuit has deprived Arizona of the benefits of its successful and costly efforts to opt in to Chapter 154, in defiance of the will of Congress.

The Ninth Circuit discerned a congressional intent that states only benefit from Chapter 154 if the appointment of PCR counsel to indigent capital defendants awaiting state collateral review is immediate, without any inquiry into whether prejudice results from a delayed appointment. Settling the question of congressional intent on this point is critical to the 37 states that have the death penalty, the vast majority of which are attempting to opt in to Chapter 154.[1] Thus, this Court should address this

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1. In addition to Arizona, some of those states that have asserted opt-in status in which a published opinion has been issued include: Alabama (*Neelley v. Nagle,* 138 F.3d 917 (11th Cir. 1998)), Arkansas (*Noel v. Norris,* 194 F.Supp.2d 893 (E.D. Ark. 2002)), California (*Ashmus v. Woodford,* 202 F.3d 1160 (9th Cir. 2000)), Florida (*Hill v. Butterworth,* 941 F.Supp. 1129 (N.D. F. 1996)), Maryland (*Baker v. Corcoran,* 220 F.3d 276 (4th Cir. 2000)), Missouri (*Skillicorn v. Luebbers,* 265 F.3d 687 (8th Cir. 2001)), Nebraska (Ryan v. Hopkins, 1996 WL 539220 (D. Neb, 1996))North Carolina (*Ward v. French,* 989 F.Supp 752 (E.D. N. Ca. 1997)), Ohio (*Jamison v. Collins,* 100 F.Supp.2d 521 (S.D. Ohio 1998)), Pennsylvania (*Death Row Prisoners*

(continued...)

important question of law and clarify the intent of Congress. *See id.*

ON THIS SIGNIFICANT QUESTION OF LAW, THE NINTH CIRCUIT ACTED IN DEFIANCE OF CLEAR CONGRESSIONAL INTENT.

A committee appointed by Chief Justice Rehnquist to study the necessity of federal legislation aimed at avoiding delay in capital cases estimated that 80% of the time spent in collateral proceedings is in the federal court system with "repetitive litigation" and "endless filings" that operate only to "frustrate the [death penalty] law of 37 states." Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, 135 Cong. Rec. S13471-04, *S13482 (The Powell Committee Report). Led by retired Justice Powell, this committee recommended the legislation in Chapter 154 of the AEDPA to provide states with the opportunity to reduce this delay, in exchange for assuring indigent capital defendants competent counsel in state collateral review proceedings. *Id.* at *S13482-83.

Toward that end, Chapter 154 contains several shortened time periods for federal habeas review of state capital cases —including a shortened limitations period for filing an application for habeas relief, a restricted period of time for the district court to rule on claims raised in the habeas petition, and an expedited appellate procedure. 28 U.S.C. §§ 2263, 2266.

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1. (...continued)
of Penn. v. Ridge, 106 F.3d 35 (3rd Cir. 1997)), South Carolina (*Howard v. Moore,* 131 F.3d 399 (4th Cir. 1997)), Texas (*Carter v. Johnson,* 110 F.3d 1098 (5th Cir. 1997)), Utah (*Tillman v. Cook,* 25 F.Supp.2d 497 (D. Utah 1998)), and Virginia (*Breard v. Netherland,* 949 F.Supp. 1255 (E.D. Va. 1996)).

A. Arizona's amended procedures governing the appointment, compensation, and funding of PCR counsel facially comply with the requirements of Chapter 154.

States that want to benefit from the procedural provisions in Chapter 154 must "opt in" to Chapter 154 by providing indigent capital defendants competent counsel to represent them throughout the state collateral review proceedings. To opt in, a state is required to:

> establish[] by statute, rule of its court of last resort, or by another agency authorized by State law, *a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings* brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

28 U.S.C.A. § 2261(b) (emphasis added). States must offer competent PCR counsel to all capital prisoners and provide for the entry of an order that either: (1) appoints one or more counsel to an indigent prisoner who accepts the offer, (2) finds that a prisoner who rejects an offer did so knowingly, or (3) denies the appointment of counsel if the prisoner is not indigent. *Id.* at (c).

As found by the Ninth Circuit in its decision, Arizona's amended system satisfies all of the requirements in Chapter 154 as enacted—Arizona requires the appointment of PCR counsel who meet strict standards of competency, are adequately compensated, and are reimbursed for all reasonable litigation

costs and expenses.

B. The Ninth Circuit erroneously interpreted Chapter 154 and denied Arizona the *quid pro quo* benefit promised by Congress.

Although indigent capital defendants in Arizona have benefitted from this amended system for more than 4 years, the Ninth Circuit's opinion denies Arizona the corresponding benefits from having enacted the system. The sole reason for denying Arizona the benefits of its efforts is the delay in the appointment of PCR counsel—a delay that has never been alleged to have worked to Spears' detriment, but was nevertheless held unacceptable under both state law and federal law. Neither state nor federal law supports the Ninth Circuit's ruling.

The Ninth Circuit's opinion ignores relevant state law provisions governing the timing of the appointment of PCR counsel. The Arizona Supreme Court's issuance of the mandate triggers the events leading to the appointment of PCR counsel. Under Rule 31.23(b)(1), Arizona Rules of Criminal Procedure, the mandate is normally issued in capital cases when certiorari review is concluded or the time for seeking review has expired. Once the mandate issues, the notice of post-conviction relief is automatically and "expeditiously" filed by the clerk of the supreme court. A.R.S. § 13–4235(D); Ariz. R. Crim. P. 32.4(a). Next, for cases prior to December 1, 2000, (which includes Spears' case) post-conviction counsel is required to be appointed within 15 days of the notice. Former Ariz. R. Crim. P. 32.4(c).[2]

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2. Currently, PCR counsel may be appointed as soon as the Arizona Supreme Court affirms the conviction and sentence, without waiting for this Court's ruling on a petition for certiorari review. Ariz. (continued...)

As the Ninth Circuit noted in its decision, the Arizona Supreme Court substantially delayed the issuance of the mandate in this case, issuing it many months after this Court denied certiorari review. Thus, there was a delay of 1 year and 8 months in the appointment of PCR counsel and commencement of post-conviction proceedings. The opinion characterizes the supreme court's delay in the issuance of the mandate as "an utter failure" of Arizona to follow its own system for the timely appointment of counsel. *Spears*, 283 F.3d at 1019.

To the contrary, Rule 31.20 of the Arizona Rules of Criminal Procedure expressly grants the state supreme court the power to suspend Rule 31.23's normal requirements for issuance of the mandate in "exceptional circumstances":

> In exceptional circumstances, the Appellate Court, on motion of a party or on its own initiative, may suspend the requirements of any section of Rule 31, and may substitute any other appropriate order of proceedings.

Under the authority of Rule 31.20, the supreme court reasonably elected to issue the mandate only when PCR counsel became available for appointment—once PCR counsel became available, the court simultaneously issued the mandate, appointed counsel, and filed the notice of post-conviction relief. (C.R. 13, Exhibit E; Orders dated July 17, 1998.)

This procedure remains in effect, and the exceptional circumstances existing in Arizona justify the substituted procedure. After Arizona amended its system to comply with

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2. (...continued)
R. Crim. P. 32.4(c)(1) (Supp. 2002).

Chapter 154, defense attorneys effectively boycotted the system—most by simply refusing to apply for appointment; some by raising the specter of charges of ethical violations. *See* John Stookey and Larry Hammond, New Rules on Indigent Representation, 33 *Arizona Attorney* (February 1997); Arizona's Crisis in Indigent Capital Representation, 34 *Arizona Attorney* (March 1998). In a letter to the Arizona Supreme Court, the judge who chaired the committee that screened applications for appointment stated that the committee received few applications for appointment because the defense bar was dissatisfied with the compensation provisions of the amended system. (C.R. 32, Exhibit 1 at 2–3.)

After the compensation provision was clarified via emergency legislation, more attorneys applied for appointment and were appointed under the same substituted procedure applied in Spears' case. In the meantime, however, a backlog formed of approximately 15 defendants awaiting the appointment of PCR counsel. In those cases, as in Spears' case, there was delay ranging from 1 year–8 months to 2 years–6 months. (C.R. 31 at 11.) The mandate had to be delayed in each case until additional attorneys were approved for appointment or an attorney already on the list was able to take an additional case.

Thus, the supreme court's substituted procedure of delaying the mandate was within the scope of state law in Spears' case, and it remains so now. These circumstances are truly unusual, and they justify the continuing practice of suspending the normal mandate rule. *See State v. Herber,* 121 Ariz. 374, 376, 590 P.2d 913, 915 (1979) (Rule 31.20 equates with Rule 2 of the Federal Rules of Appellate Procedure); *Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158, 1161 (5th Cir. 1969) (under Rule 2, where usual appellate procedure is not warranted, appellate court can and should prescribe method to be followed).

Furthermore, Arizona's procedure does not contravene the letter or spirit of Chapter 154. The Ninth Circuit's opinion attempts to discern a contrary congressional intent where none exists. *Spears*, 283 F.3d at 1016-17. Neither the statutes nor the legislative history of Chapter 154 suggest that PCR counsel must be appointed without delay.

The requirements Congress set forth in 28 U.S.C.A. § 2263 are numerous, comprehensive, and expressly-enumerated. They do *not* include a requirement on the timing of the appointment of post-conviction relief counsel. Given Congress's ability and willingness to detail the requirements for opt-in status, the fact that Congress did not expressly include a requirement on the timing of appointment of PCR counsel is compelling evidence that they did not intend one. *See, e.g., Dupnik v. United States*, 848 F.2d 1476, 1480 (9th Cir. 1988) (Congress' failure to include a specific requirement in a statute when it logically would be included reveals a congressional intent against including that requirement).

Several other points support this conclusion. The Powell Committee Report, which sets forth the legislative history of Chapter 154, specifies that the problem Chapter 154 is designed to address is excessive delay *in federal court*. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, 135 Cong. Rec. S13471-04, *S13482 (The Powell Committee Report). The report indicates that death penalty cases take *four times longer* to complete federal habeas proceedings than to complete state collateral proceedings. *Id.*

In Arizona, the direct appeal and collateral review processes in death penalty cases traditionally have not been particularly lengthy. Recent statistics compiled for the Arizona Capital Case

Commission show that it takes slightly over 2 years from the notice of appeal for the Arizona Supreme Court to issue its opinion. The Center for Urban Inquiry, College of Public Programs, Arizona State University, *Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission* at 27 (March 2001). For the state collateral proceedings, it has taken about 1 year and 8 months from the denial of certiorari review to the trial court's ruling on the PCR petition. *Id.* Although the Arizona State University Study does not specify the length of time from the trial court's denial of PCR relief to the denial of the subsequent petition for review, it took 11 months in Spears' case. (C.R. 23 at 12.) Assuming Spears' case is representative, the total time for state collateral proceedings in Arizona is less than 3 years.

Thus, there is no basis for concluding that Congress would have intended that an immediacy requirement for the appointment of PCR counsel to accelerate state collateral proceedings. The only concern about state collateral review expressed by the Powell Committee Report was ensuring competent counsel. 135 Cong. Rec. at *13482–83.

The Ninth Circuit points to the fact that the 180-day limitations period in Chapter 154 begins to run upon "final state court affirmance" on direct appeal, and is not tolled while defendants await the appointment of post-conviction relief counsel, as support for concluding that there can be no delay in the appointment. *Spears*, 283 F.3d at 1017. The Arizona system demonstrates the error in this analysis. The state court affirmance becomes "final" upon issuance of the mandate, which then triggers an automatic notice of post-conviction relief and the

expeditious appointment of post-conviction relief counsel.[3] The 180-day period thus only begins upon issuance of the mandate. Under Arizona's normal procedure and substituted procedure, counsel is appointed very shortly thereafter; in fact, under the substituted procedure, counsel is appointed on the very same day the mandate is issued. Thus, there will never be significant lapses of time while a defendant awaits the appointment of PCR counsel.

As a matter of practicality, too, Congress could not have intended that a State only benefit from Chapter 154 if the appointment of post-conviction counsel is immediate. Once again, Arizona's system demonstrates why. The small backlog of prisoners awaiting appointment of counsel has decreased over time as additional attorneys have been added to the list, and will undoubtedly reach zero. For that snapshot in time, counsel will be appointed immediately. However, there very well may be a time shortly thereafter when one or two attorneys are removed from the list of qualified attorneys or when there is an influx of capital cases, and the backlog is back up to two or three cases. This ebb and flow of qualified attorneys and cases is reasonably foreseeable in every system and must be accommodated.

Similarly, a situation may arise in which a particularly

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3. The federal district court has already ruled that final state court affirmance means issuance of the mandate in Arizona. *Hedlund v. Stewart*, CIV 97–755–PHX–SMM (consolidated), Order dated 9/19/97 at 5–7. Arizona had initially argued that final state affirmance means the date the Arizona Supreme Court issues its opinion. Arizona also argued, however, that in cases in which the amended mechanism was not in place when the direct appeal was decided, the limitations period should not begin to run until the date counsel was appointed in the state PCR proceeding.

lengthy, voluminous, and complex capital case takes several months to assign to an attorney who has the capacity to take the case. In Arizona, for example, *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992), involved a trial that lasted for months, and the supreme court opinion is so long it has an index. The case file fills an entire room. A qualified attorney may take several months to clear their calendar prior to accepting a case that will take several months of concentrated effort to complete. This situation is not unforeseeable and also must be accommodated. Thus, requiring the immediate appointment of PCR counsel ignores the practical realities of death penalty litigation.

Finally, requiring an absence of delay before a state can enforce Chapter 154's provisions may allow, or even invite, a manipulation of the system so that capital defendants receive all of the benefits of the amended state system while preventing the State from ever receiving the *quid pro quo* benefits in federal court. For example, if a state is only entitled to enforce Chapter 154's provision if appointments are immediate, then qualified counsel need only decline to accept cases in a timely manner to forestall enforcement in federal court. Surely this is not a result that Congress intended.

C. The standard should be one of prejudice.

The most sensible standard for evaluating the timing of the appointment of PCR counsel is one that focuses on prejudice resulting from a delay. Other federal cases that have addressed Chapter 154 require either actual prejudice that the defendant demonstrates or inherent prejudice that results from undue delay. Actual prejudice, for example, was shown in *Hill v. Butterworth*, 941 F.Supp. 1129 (N.D. Fla. 1996), where the 180-day statute of limitations was actually running during the delay in appointing

counsel and likely expired before counsel was appointed.

Likewise, prejudice inherent in undue delay was shown in *Ashmus v. Calderon (Ashmus II)*, 123 F.3d 1199 (9th Cir. 1997), in which the Ninth Circuit reviewed California's unitary review system. The court found a delay of several years in appointing counsel intolerable in a system in which the defendants' convictions and sentences had never been reviewed by any court and were not yet final.

Neither form of prejudice exists in this case. Arizona's system ensures that the 180-day period does not even begin to run, much less expire, prior to the appointment of counsel. Petitioner has never argued any other form of actual prejudice from the delay, and the record reveals none. Nor is the delay that has thus-far existed in Arizona, a non-unitary review state, undue and inherently prejudicial. In Arizona, the direct appeal of all capital cases is automatic and immediate. A.R.S. § 13–703.01(A). That review includes a *de novo* review of the aggravating and mitigating circumstances and imposition of the death penalty. *Id.* at (A), (B). The defendant then has the opportunity to seek certiorari review in this Court. Thus, the defendant's convictions and sentences have been reviewed and are final prior to the commencement of PCR proceedings. Accordingly, there is nothing about the delay in Arizona that would render it undue or inherently prejudicial.

CONCLUSION

This case presents an important question of law in death penalty jurisprudence, the resolution of which is likely to substantially reduce the unnecessary delay that has plagued capital cases in the federal court system. Arizona engaged in the painstaking and costly amendments to its procedures governing

the appointment and compensation of PCR counsel to comply with the provisions in Chapter 154 of the AEDPA. Indigent capital defendants in Arizona have benefitted from these provisions for more than 4 years. By discerning a congressional intent where there is none, the Ninth Circuit has erroneously deprived Arizona of the *quid pro quo* benefits promised by Congress. Petitioner therefore respectfully requests this Court to grant the Petition for Writ of Certiorari to review this important question and to dismiss Spears' federal habeas petition as untimely.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY MARSHALL SPEARS, Petitioner- Appellee,	)	No. 01-99000
	)	D.C. No.
v.	)	CV-OO-OIO51-PHX-SMM
TERRY STEWART, Director of the Arizona Department of Corrections, and CHARLES GOLDSMITH,* Warden, Arizona State Prison--Eyman Complex, Respondents-Appellants.	)	**ORDER AND AMENDED OPINION**

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
June 13, 2001--San Francisco, California

Filed September 24, 2001
Amended March 20, 2002

Before: James C. Hill,** Susan P. Graber, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge Graber

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*Charles Goldsmith is substituted for his predecessor, George Herman, as Warden, Arizona State Prison--Eyman Complex. Fed. R. App. P. 43(c)(2).

**The Honorable James C. Hill, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that a state is not entitled to enforce the expedited federal habeas corpus procedures in capital cases when the state's appointment of counsel for a petitioner does not comply with the state's own timeliness requirement for opting-in to the expedited federal procedures.

Appellee Anthony Spears was convicted of first-degree murder and theft and was sentenced to death. The Arizona Supreme Court affirmed Spears's convictions and sentence and the Supreme Court of the United States denied certiorari. Spears filed a federal habeas petition pro se, which the district court dismissed without prejudice, for failure to exhaust state remedies. Almost 20 months after the Arizona Supreme Court had affirmed Spears's conviction and sentence, the Arizona Supreme Court issued a mandate and appointed counsel for Spears's state post-conviction proceedings. The Arizona trial court denied the petition. The Arizona Supreme Court denied Spears's petition for review and issued the warrant for his execution.

Spears filed a second federal habeas petition, and the district court granted his application for a stay of execution. Appellant Terry Stewart, Director of the Arizona Department of Corrections, moved to dismiss the petition as untimely, arguing that Arizona was an opt-in state under Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the expedited federal habeas corpus procedures in capital cases. Stewart contended that Spears's petition was time-barred by the 180-day limitations period of those provisions. The court denied Stewart's motion, ruling that Arizona's mechanism for the appointment of counsel in capital cases failed to meet the applicable criteria.

Under Arizona's system, a lawyer must have been a member in good standing of the Arizona bar for five years or more, had recent experience in criminal litigation, and demonstrated sufficient proficiency and commitment to handle a capital case. Arizona compensated court-appointed lawyers at a maximum hourly rate of $100 per hour for up to 200 hours of work. Arizona mandated the payment of reasonable costs, as well as reasonable fees to investigators and experts, whenever the court deemed them reasonably necessary. Post-conviction counsel would be appointed within 15 days following the issuance of the notice of post-conviction relief, which, itself, would issue upon either (1) the Supreme Court's denial of certiorari or (2) the expiration of the 90-day period for filing for certiorari.

The district court certified an interlocutory appeal to the court of appeals to review its determination that Arizona failed to qualify as an opt-in state at the time counsel was appointed in Spears.

[1] Chapter 154 of AEDPA provides a state with procedural benefits in federal habeas cases filed by capital defendant if the state has opted in to is provisions. A state with a post-conviction procedure can opt in by establishing a system for the appointment of counsel to represent capital defendants in state post-conviction proceedings. **[2]** To qualify, Arizona's system had to provide (1) mandatory and binding competency standards for appointed counsel, (2) reasonable compensation for appointed counsel, (3) payment of reasonable litigation expenses, and (4) an offer of post-conviction counsel to all capital defendants. **[3]** On its face, the Arizona system entitled the state to opt in to the procedures of Chapter 154

[4] In order to receive the benefits of Chapter 154 in a particular case, a state must fist have in place a system that meets the federal statutory criteria for the appointment of post-conviction counsel for indigent capital defendants. A state must appoint counsel in compliance with its own system before a federal court will enforce the Chapter 154 time line on its behalf in a particular case. **[5]** Post-conviction counsel was not appointed for Spears until 20 months after the Supreme Court denied certiorari. The Arizona system required the appointment of

counsel, in a case of this kind, within 15 days from the date on which the state issued the notice of post-conviction relief. Because timeliness is a requirement at the heart of the post-conviction procedure, and that state failed to meet the extant requirement, Arizona was not entitled to enforce the procedures of Chapter 154 in Spears's case.

COUNSEL

Monica Beerling Klapper, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellant.

Sylvia J. Lett and Dale A. Baich, Assistant Federal Public Defenders, Phoenix, Arizona, for the petitioner-appellee.

Julie S. Hall, Tucson, Arizona, for amici curiae.

ORDER

The opinion filed September 24, 2001, is amended as follows:

On slip opinion page 13530, footnote 2, change to:

> Specifically, the court held that (I) July 17, 1998, was the relevant date for determining whether Arizona met the requirements of Chapter 154 for the purpose of Petitioner's case and that (2) Arizona's system provided (a) for the payment of reasonable litigation expenses and (b) adequate competency standards for appointed counsel. However, the court concluded that Arizona's offer of counsel did not comply with 28 U.S.C. § 2261 in other respects.

On slip opinion page 13551: delete footnote 19.

On slip opinion page 13552, line 2: delete "substantially."

With these amendments, the panel has voted to deny the petitions for panel rehearing. Judges Graber and McKeown have voted to deny the petitions for rehearing en banc, and Judge Hill has taken no position.

The full court was advised of the petitions for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing and petitions for rehearing en banc are DENIED.

REINHARDT, Circuit Judge, with whom Circuit Judges HAWKINS, THOMAS, and PAEZ join dissenting and with whom Circuit Judge TASHIMA joins except as to Part IV (as to which he withholds judgment); Circuit Judge RAWLINSON joins except as to Part IV .A; and Circuit Judges PREGERSON, WARDLAW, W. FLETCHER, FISHER, and BERZON join as to Parts I, II, & III:

The decision in this case is similar to that in *Bush v. Gore*[1] --good for this case and this case only --except that here the decision is not even good for this case. The three judge panel, consisting of two Ninth Circuit judges and one visiting judge, overrode the Chief District Judge for the District of Arizona (a former prosecutor with many years of experience in Arizona) and determined that although: (a) the question whether Arizona had opted-in to the shortfuse habeas scheme provided

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1. 531 U.S. 987 (2000).

in Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §§ 2261-66, was entirely irrelevant to the outcome of the case before it; (b) the linchpin provision of the procedures by which Arizona had once sought to opt-in under Chapter 154 had already been repealed by the state; (c) the state did not even comply with its own procedures in the case before the panel; (d) Arizona was unquestionably not in compliance with Chapter 154 at the time the appeal was heard; (e) in fact, the state had never at any time effectively complied with its short-lived procedures; and (f) no other state in the nation has ever been held to have successfully opted-in under Chapter 154,[2] the panel would seize this opportunity to issue an advisory opinion stating that the no-longer-existent Arizona procedures were in compliance with Chapter 154's requirements. In doing so, it did not even mention that the critical Arizona provision underlying its "decision" had previously been repealed. Perhaps because the offending portion of the panel's opinion was so patently advisory,

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2. **See** *Ashmus v. Woodford*, 202 F.3d 1160, 1160 (9th Cir. 2000), *cert. denied*, 531 U.S. 916 (2000) (California has not opted-in); *Harris v. Bowersox*, 184 F.3d 744, 748 (8th Cir. 1999) (Missouri has not opted-in); *Duvall v. Reynolds*, 139 F.3d 768, 776 (10th Cir. 1998) (Oklahoma has not opted-in); *Hill v. Butterworth*, 941 F. Supp. 1129, 1146-47 (N.D. Fla. 1996), *vacated on other grounds by* 147 F.3d 1333 (11th Cir. 1998) (Florida has not opted-in); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997) (Texas has not opted-in); *Austin v. Bell*, 126 F.3d 843, 846 n.3 (6th Cir. 1997) (Tennessee has not opted-in); *Holloway v. Horn*, 161 F. Supp. 2d 452, 478 n.11 (E.D. Pa. 2001) (Pennsylvania has not opted-in); *Smith v. Anderson*, 104 F.Supp.2d 773, 786 (S.D. Ohio 2000) (Ohio has not opted-in); *Oken v. Nuth*, 30 F.Supp.2d 877, 879 (D. Md. 1998) (Maryland has not opted-in); *Tillman v. Cook*, 25 F.Supp.2d 1245, 1253 (D. Utah 1998) (Utah has not opted-in); *Weeks v. Angelone*, 4 F.Supp.2d 497, 506 n.4 (E.D. Va. 1998) (Virginia has not opted-in); *Ryan v. Hopkins*, 1996 WL 539220, at *4-3 (D. Neb. 1996) (Nebraska has not opted-in).

affected neither the petitioner nor any other petitioner the panel has been able to identify, and will affect no future petitioners, the call to re-hear this matter en banc failed to attract the affirmative votes of a majority of the active non-recused judges notwithstanding that *both* parties sought an en banc re-hearing. Unfortunately, as I have noted on several occasions in the past,[3] our rules preclude us from advising the bar and the public whether there were actually more yes votes than no votes cast (although less than an absolute majority); whether half of the non-recused active judges voted to hear the case en banc, or a lesser number; or describe in any way the margin by which a vote may have failed. In this case, as in all others, I believe the public has a right to know how close the vote was and how each of us exercised our judicial responsibilities; that information would surely be of interest to those concerned about the manner in which the courts and particularly our court functions.

In any event, for the reasons set forth below, I disagree with the views of those of my colleagues who thought the case simply not deserving of en banc review, as well as any who may have agreed with the substance of the dicta propounded by the panel. I do so because the fact that the opinion is advisory in nature may not be apparent on its face, and because I believe that the views the panel felt it necessary to express are erroneous. Were the issue not both so novel and so important, I might have agreed with those who concluded that an opinion that has no legal effect should simply be ignored and allowed to die a quiet death. I fear,

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3. See, e.g., *In re Silicon Graphics Inc. Securities Litigation.* 195 F 3d 521, 523-24 (9th Cir. 1999) (Reinhardt, J., dissenting from denial of en banc review); *United States v. Koon,* 45 F.3d 1303, 1308-10 (9th Cir.1995) (Reinhardt, J., dissenting from denial of en banc review); *Brewer v. Lewis,* 997 F.2d 550, 556 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Elder v. Holloway,* 984 F .2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez,* 949 F.2d 1497,1539 (9th Cir. 1990) (Reinhardt, J., dissenting from denial of en banc review).

however, that the district courts of our circuit and other judges in other parts of the country may get the wrong impression of the status of this unprecedented opinion, and apply in other cases its erroneous views on what constitutes compliance with Chapter 154, unless someone points out the lack of precedential or other legal effect. To put it bluntly, neither we, nor any other court is bound by the panel's advisory declarations in this case.

I THIS IS A CASE OF EXCEPTIONAL IMPORTANCE THAT SHOULD HAVE BEEN RE-HEARD EN BANC.

The issue that the panel *actually* decided is routine and of no particular significance. As the panel concluded, Arizona did not appoint counsel for Spears in a timely manner under its own procedures; thus, Spears's case was not subject to the abbreviated capital review procedures provided by Chapter 154 of AEDPA. In other words, the panel *held* that Spears's habeas proceeding is subject to the same rules and procedures as all other capital defendants' throughout the country. This on its face is rather a mundane decision, not even worthy of publication. However, what the panel also *purported* to decide in the advisory portion of its opinion is both novel and highly consequential. The panel gratuitously proclaimed that Arizona had, as a general matter, opted-in to Chapter 154 by establishing a "timeliness" procedure with which the state did not and could not as a practical matter comply, and by adopting some highly questionable, if not wholly inadequate, provisions regarding attorneys fees and attorney competency standards. The consequences of the panel's unwarranted dictum, if adopted by this court or others in the future, would be enormous.

Chapter 154, to which no other state has yet successfully opted-in, provides for a short-fuse system of federal habeas review for capital prisoners for whom the state appoints counsel in accordance with the specific requirements of that Chapter. Under AEDPA, capital prisoners surrender significant post-conviction rights in exchange for what they

should be entitled to in any event --competent counsel.[4] What is even more extraordinary about Chapter 154 is that it establishes short time periods within which federal courts must resolve capital habeas cases, regardless of their complexity and regardless of the difficulty courts or counsel may have in obtaining necessary evidence or other materials, including records of the oft-times voluminous state proceedings. The Congressionally-established time limits could well serve to disrupt the dockets, and the ordinary handling of civil and criminal cases, in jurisdictions that cover states that have large backlogs of capital cases, such as Arizona and California. Moreover, the novel procedure raises significant constitutional questions, primarily with respect to the separation of powers between the legislative and judicial branches of government.

Given all of the above, the first decision in the nation to announce, albeit in wholly improper dicta, that a state had succeeded in opting-in to Chapter 154 is surely one of national importance that warrants en banc review.

II THE PANEL'S DECISION THAT ARIZONA SUCCESSFULLY OPTED-IN TO THE ABBREVIATED CAPITAL REVIEW PROCEDURES OF CHAPTER 154 CONSTITUTES AN ADVISORY OPINION.

The panel's statement that Arizona opted-in to Chapter 154's abbreviated capital review procedures is clearly unnecessary to its resolution of the case, does not affect its outcome in any manner, and constitutes an advisory opinion. The binding portion of the panel opinion *holds* that Spears is entitled to the one-year AEDPA statute of limitations rather than the abbreviated Chapter 154 procedures because

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4. *But see Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (stating that habeas petitioners do not have a constitutional right to effective assistance of counsel); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996) (same).

the appointment of counsel in his case did *not* meet the requirements set forth in the Arizona statutory scheme.[5] Thus, whether or not the Arizona scheme satisfied the requirements of Chapter 154 was entirely irrelevant to the outcome of Spears's case. Spears was entitled to the normal habeas procedures regardless of whether Arizona's now-defunct scheme met the standards for opting-in under that Chapter. Under these circumstances, the panel could and should have avoided the highly controversial question it unnecessarily reached out for and purported to decide. *See Anderson v. United States*, 417 U.S. 211, 218 (1974) (stating that it is "inadvisable. ..to reach out in this fashion to pass on important questions of statutory construction when simpler, and more settled, grounds are available for deciding the case at hand"). The United States District Court for South Carolina, when faced with a similar situation, did precisely that. In *Tucker v. Moore*, 56 F.Supp.2d 611,614 (D. S.C. 1999) (internal citations omitted), the court held that:

> If the Respondents did not follow their own procedures set forth in [South Carolina statutes] when appointing counsel for the Petitioner. ..then the Respondents cannot invoke Chapter 154 of the AEDPA against the Petitioner in this federal habeas action, even assuming [South Carolina statute] does satisfy 28 U.S.C. § 2261 (b) and (c). This Court is expressly not passing on the issue of whether [South Carolina statute] meets the requirements of 28 U.S.C. § 2261(b) and (c), because it is not necessary to reach that issue.

Because there was no reason for the panel to announce that Arizona had opted-in to Chapter 154's procedures in a case in which it made no difference whether the state had done so, the panel's statements

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5. Specifically, although Arizona's statutory scheme required the appointment of post-conviction counsel within 15 days of the completion of direct review proceedings. Spears's counsel was appointed 1 year and 8 months after the conclusion of his direct appeal. Such non-compliance with the Arizona procedures was routine. *See infra* note 8.

proclaiming its views on that point constitute an advisory opinion. *See. e.g., Association of Mexican- American Educators v. California,* 231 F 3d 572, 590 (9th Cir. 2000) (en banc) (declining to address the plaintiffs' Title VI claim because it was unnecessary given the resolution of the identical claim under Title VII and therefore, anything written about the Title VI claim would constitute "an advisory opinion'. The contents of that portion of the panel opinion are entirely dicta. *See. e.g., United States v. Henderson,* 961 F.2d 880,882 (9th Cir. 1992) (defining dicta as language that is "unnecessary to the court's holding"); *United States v. Crespo de Llano,* 830 F.2d 1532, 1542 n.2 (9th Cir. 1987) (holding that the court's previous statement that review of a district court determination of the voluntariness of a confession is for clear error was dictum because the court ultimately ruled that the confession in question was not involuntary under either a de novo or a clear error standard).[6]

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6. *See also Central Green Co. v. United States,* 531 U.S. 425, 431 (2001); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18,23 (1994); *Steel Co. v. Citizens for a Better Environ,* 523 U.S. 83, 121 (1998) (Stevens, J., concurring); *Boos v. B~,* 485 U.S. 312, 338 (1988) (Bren- nan, J., concurring); *United States v. Mead Com,* 121 S. Ct. 2164, 2185 (2001) (Scalia, J., dissenting); *Hallstrom v. Tillamook County,* 493 U.S. 20,34 n.* (1990) (Marshall, J., dissenting); *United States v. Enas,* 204 F.3d 915,920 (9th Cir. 2000); *Stewart v. Thome Holding Co. Profit Sharing Plan,* 207 F.3d 1143,1154 n.8 (9th Cir. 2000); *The Ex}2ort Group v. Reef Industries. Inc.,* 54 F.3d 1466, 1472 (9th Cir. 1995); *United States v. Ramos,* 39 F.3d 219,221 (9th Cir. 1994); *Operating Engineers Pension Trust v. Charles Minor Equipment Rental Inc.,* 766 F.3d 1301, 1307 (9th Cir. 1985); *McDaniel v. Sanchez,* 452 U.S. 130, 141 (1981); *United States v. Johnson,* 256 F.3d 895, 920 (9th Cir. 2001) (Tashima, J., concurring).

While I appreciate the fact that the question certified to this court by the district court was whether Arizona opted-in to Chapter 154, that is by no means dispositive here, because, as we have previously held,

(continued...)

III THE PANEL'S DECISION THAT ARIZONA SUCCESSFULLY OPTED-IN TO AEDPA'S SHORT -FUSE CAPITAL REVIEW PROCEDURES IS PURELY ADVISORY BECAUSE IT RELIES ON A PORTION OF ARIZONA'S STATUTORY SCHEME THAT HAD ALREADY BEEN REPEALED.

The panel's decision to reach out and unnecessarily rule on Arizona's opt-in status is particularly egregious because the opinion does not purport to rule that Arizona's then-current (and now-current) system complies with Chapter 154. Rather, the panel, without even mentioning that the Arizona procedure it purported to validate was no longer in effect, proceeded to announce that a statutory system that was once on its books, that did not affect the outcome of petitioner's case, and that Arizona was effectively unable ever to comply with, satisfied Chapter 154. Remarkably, the panel does not state in its opinion that, after the appointment of Spears's counsel but before the panel decided his appeal, Arizona had removed from its statutory scheme the linchpin provision --the provision requiring that indigent capital prisoners receive post- conviction review counsel in a timely manner, specifically within 15 days of either the Supreme Court's denial of certiorari or the

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6. (...continued)
"[o]ur jurisdiction [when entertaining interlocutory appeals] ...is not limited to deciding the precise question the district court certified to us. Rather, we ...may address any issue fairly included within [the question]. *Lee v. American National Insurance Co.,* 260 F .3d 997, 1000 (9th Cir. 2001); *also Tillema v. Long,* 253 F .3d 494, 502 n.11 (9th Cir. 2001) (stating that "it is not arguments that are certified, it is issues and claims"). Indisputably, a district court cannot compel this court to issue advisory opinions or even to engage in dicta simply by certifying questions that we either have no jurisdiction to, or should not properly, answer. In such cases, like all others, we follow the rules that generally govern our decision-making.

expiration of the 90-day time period provided for Seeking a writ of certiorari.[7] Yet it is that very provision that 4501 the panel relied on to justify its view that Arizona's statutory scheme provided for the *timely* appointment of post-conviction counsel, as required under Chapter 154. *See Spears v. Stewart*, 267 F.3d 1026, 1039-41 (9th Cir. 2001).

The panel also fails to mention that Arizona's statutory scheme was never truly implemented, and was a scheme in name only. When the 15-day appointment requirement was on the books, Arizona *routinely*

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7. At the time Spears's counsel was appointed, Arizona Rule of Criminal Procedure 32.4(c) stated that "[u]pon the filing of a timely notice in a capital case, or the first notice in a non-capital case. ..the presiding judge shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. ..."

In 2000, Arizona amended Rule 32.4 and removed the I5-day appointment requirement. As it is currently written, Rule 32.4(c) states:

> (1) Capital Cases. Upon the filing of the notice by the clerk of the Supreme Court in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the defendant is determined to be indigent. ...

Neither § 13-4041 nor Rule 6.8 requires that counsel be appointed within any particular time period. Rather, § 13-4041 requires only that counsel be appointed "[a]fter the supreme court has affirmed a defendant's conviction and sentence in a capital case." § 13-4041(B). Rule 6.8 refers to competency standards and not to the timing of counsel's appointment. Therefore, Arizona's *present* statutory scheme does not ensure the timely appointment of counsel and is indisputably insufficient to permit the state to opt in to Chapter 154.

violated it in capital cases.[8] The district court opinion, in which Chief Judge McNamee ruled that Arizona's statutory scheme was insufficient to permit it to opt in to Chapter 154's capital procedures, related undisputed evidence that protracted delays in the appointment of counsel were commonplace in the Arizona system.[9] The panel ignored the overwhelming evidence of Arizona's non-compliance with its statutory procedures and *ipse dixit* announced that the mere formal existence of the 15-day appointment requirement, implemented or not, was sufficient to allow Arizona to opt-in. *See Spears,* 267 F 3d at 1040-41. At the time the opinion was issued, however, Arizona could no longer purport even to have a timeliness requirement on the books, because it had repealed the 15-day appointment provision with respect to death penalty cases. Thus, Arizona was indisputably not in compliance with AEDPA 's Chapter 154 requirements when the panel issued its advisory opinion, and is indisputably not in compliance today.

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8. *See* Petitioner-Appellee's Response to Respondent-Appellant's Petition for Rehearing and Petition for Rehearing En Banc at 10 (stating that Arizona had great difficulty finding counsel within 15 days); Respondents-Appellants' Petition for Rehearing and Petition for Rehearing En Banc at 4-5 (same).

9. Specifically, Charles Hedlund waited 2 years and 2 months for post- conviction counsel; Roger Murray waited 1 year and 10 months; Richard Hurles waited 2 years; Danny Jones waited 2 years and 5 months; Darrel Lee waited 1 year and 9 months; Michael Gallegos waited 2 years and 1 month; James McKinney waited 2 years and 6 months; Robert Towery waited 1 year and 10 months; Levi Jackson waited 1 year and 8 months; Kenneth Laird waited 2 years and 1 month; David Hyde waited 1 year and 10 months; Thomas Kemp waited 1 year and 10 months; and Kevin Miles waited 2 years and 1 month. *See Spears v. Stewart,* No. CV 00-1051-PHX- SMM, at 14 (D. Ariz. filed Nov. 21,2000). It was these facts, set forth in the district court opinion, that Chief Judge McNamee relied on as the basis for his finding that "Arizona has not complied with the timeliness requirement of [AEDPA]." *See id.* at 17.

The timely appointment of counsel at the conclusion of direct review is an essential requirement in AEDPA's opt-in structure. *See id.* at 1039. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. *See id.* The elimination of the 15-day appointment requirement left Arizona's statutory scheme without any requirement for the timely appointment of counsel. Thus, even if Arizona had once opted-in by virtue of having a paper scheme on the books, -- and I do not believe that it had --that status was revoked, in all likelihood retroactively, when it removed the 15-day appointment requirement. Without mentioning the repeal of that requirement, however, the panel relied on the defunct provision as the basis for its unnecessary and unwarranted conclusion that Arizona's procedures complied with Chapter 154 and that the state had therefore qualified for opt-in status.

Aside from the fact that I believe the panel was wrong on the merits, I fail to understand why it felt compelled to endorse an illusory statutory scheme that the state itself had already abandoned because it was unable to comply with it, particularly in a case in which its advisory declaration did not affect the outcome of petitioner's claim.

IV THE PANEL'S DECISION IS WRONG ON THE MERITS, BECAUSE ARIZONA'S FORMER STATUTORY SCHEME DOES NOT SATISFY THE REQUIREMENTS OF CHAPTER 154.

Arizona's now defunct statutory scheme did not comply with Chapter 154 's requirements, not only because the state's inability to comply with its own timeliness provisions rendered the procedure illusory at best, but also because Arizona's rules did not require reasonable compensation for postconviction review counsel and did not ensure that "competent" counsel would be appointed in capital cases.

A Arizona did not (and still does not) provide reasonable compensation standards for post-conviction review counsel.

The Arizona statutory scheme fails to establish a mechanism *for* the reasonable compensation of Arizona's post-conviction capital attorneys, as required by 28 U.S.C. § 2261(b). *See also Baker v. Corcoran.* 220 F.3d 276,285 (4th Cir. 2000) (holding that a state must provide a mechanism *for* the payment of reasonable attorney's *fees* in order to opt-in); *Oken v. Nuth,* 30 F. Supp. 2d 877, 890 (D. Md. 1998) (same). Arizona's statute limits the compensation that attorneys may receive to no more than $100 per hour for "up to two hundred hours of work." Ariz. Rev. Stat.§ *13-4041(G). It is only if an attorney shows "good cause" that he can be compensated for more than 200 hours. § 13-4041 (H).*

Spears successfully argued before the district court that a 200-hour presumptive limit is facially insufficient for the work of a capital post-conviction attorney and that, therefore, the rule that requires counsel to prove good cause to exceed that threshold is unreasonable. *See Spears v. Stewart.* No. CV 00-1051-PHX-SMM, at 24-26 (D. Ariz. filed Nov. 21, 2000). Research studies show that state post-conviction proceedings in capital cases generally require far more than 200 hours of preparation. *See. e.g.*. Richard J. Wilson & Robert L. Spangenburg, *State Post-Conviction Representation of Defendants Sentenced to Death.* 72 Judicature 331, 336 (1989). The state did not provide evidence to the contrary even though, under *Ashmus v. Woodford.* 202 F.3d 1160, 1164 (9th Cir. 2000), *cert. denied,* 531 U.S. 916 (2000) *[hereinafterAshmus V],* the state has the burden of establishing that it satisfies each opt-in requirement. By failing to support its position that 200 hours is a reasonable threshold, the state failed to meet its burden.

Moreover, the Arizona statutory scheme does not provide a minimum hourly rate of compensation for capital post-conviction attorneys. In *Baker*, 220 F 3d at 285-86, the Fourth Circuit held that paying an attorney $35 an hour was insufficient compensation because "[a] compensation system that results in substantial losses to the appointed

attorney or his firm simply cannot be deemed adequate." Because the Ari zona Statutory scheme has no provision for a minimum hourly rate, it allows for unreasonably low compensation rates in violation of Chapter 154's requirement. The *Spears* opinion states that, if the court set an unreasonably low rate, "the Statute provide[s] a remedy: a special action in the Arizona Supreme Court." Spears, 267 F.3d at 1033. The fact that the unreasonable rate can be appealed, however, does not make it any less unreasonable. Chapter 154 requires that the state's *statutory* standards provide for reasonable compensation. Arizona's statute does not so provide and the availability of a special remedy in the state supreme court in individual cases does not render the statutory standards adequate to comply with AEDPA.

B Arizona did not (and still does not) have mandatory and binding competency standards for postconviction review counsel.

In order to opt-in to the Chapter 154 procedures, 28 U.S.C. § 2261 requires a state to establish a mechanism for the appointment of counsel for all indigent capital prisoners. Such appointments must be made in conformance with "mandatory and binding" competency standards that the state must establish by statute or rule. *See Ashmus V,* 202 F.3d at 1167. Arizona Rule of Criminal Procedure 6.8(d), however, provides an escape valve through which the state can bypass the state's competency qualifications for counsel. Specifically, Rule 6.8(d) provides that:

> In exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(I) and (2), (b) and (c) of this rule, providing that the attorney's experience, stature, and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule. Because this provision affords the state court the discretion to appoint counsel who do not possess the state-

> established competency qualifications, Arizona fails to meet the requirement that the competency standards for the appointment of counsel be "binding and mandatory." *Ashmus V,* 202 F.3d at 1167.

We have held that "[t]he requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a *court* or guideline administrator." *Id* at 1168 (emphasis added). The panel states that there is no discretion here to bypass the competency requirements because (1) subsection (d) of Rule 6.8 requires that the lawyer's qualifications "significantly exceed[ ]" the standards provided and (2) the lawyer must associate with one who meets the qualifications listed. The requirement that the lawyer's qualifications "significantly exceed[ ]" those listed in the rule vests in the *court* a vast discretion to weigh subjective factors in order to reach a determination of what it means to exceed significantly the listed qualifications, or, indeed, to exceed them at all. Under the Arizona scheme the objective competency standards need not be met where the court concludes in its discretion that an attorney is qualified on the basis of some different and previously unannounced criteria. Because Arizona's scheme affords the court a discretion to "take into consideration" various subjective factors --a discretion similar to that deemed insufficient to satisfy the AEDPA competency requirement in *Wright v. Angelone,* 944 F. Supp. 460, 466 (E.D. Va. 1996) --it is contrary to *Ashmus V.*

Nor does the requirement of "association" with an attorney who meets the qualifications ensure that an indigent defendant will receive "competent" counsel. "Association" can ordinarily mean anything from merely lending one's name to the pleadings to participating fully in the preparation of the petition, the briefs, and the oral argument. A more definitive provision than Arizona's is required.

Moreover, the Arizona statutory scheme permits the appointment of post-conviction lawyers with absolutely ill experience handling

capital cases on either direct appeal or post-conviction review.[10] While there have been very few federal cases addressing the meaning of the competency standard requirement in Chapter 154, the importance of having a capital experienced attorney has been emphasized. For example, in *Wright,* 944 F. Supp. at 467 & n.5, the court held that Virginia's statutory scheme was insufficient to allow Virginia to opt-in to the Chapter 154 procedures. The court stated that, under the Virginia scheme, "there is no requirement that counsel have had any experience with capital cases" and further stated that "it is clear. ..that capital cases are unique, not only in the punishment but in the habeas process."

The Arizona statutory scheme, rather than providing binding and mandatory standards for the appointment of competent counsel in all post-conviction review cases involving indigent capital prisoners, vests discretion in the court to appoint post-conviction review counsel who have no capital experience and whose competency is measured, not by the qualifications set forth in Arizona's rules, but by whatever indicators

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10. Arizona Rule of Criminal Procedure 6.8(c)(1) (1998) provides that:

> Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.

It is clear from the statutory language used elsewhere in Arizona Rule of Criminal Procedure 6.8 that the legislature did not intend to require the "first or second degree murder convictions" to be in capital cases. In the first sentence of Rule 6.8(c)(1), the statute refers to a "post-conviction proceeding in a case in which a death sentence was imposed." *See also* Ariz. R. Crim. P. 6.8(b)(I)(ii) (referring to "capital murder" cases). When the legislature wanted to refer to capital cases, it did so explicitly.

of "experience, stature, and record" the court deems appropriate. Ariz. R. Crim. P. 6.8(d).

V. CONCLUSION

The first court in the nation to publish an opinion announcing that a state had successfully opted-in to the capital punishment procedure under AEDPA, a procedure that substantially affects the rights of capital defendants and dramatically, and perhaps unconstitutionally, impinges on the normal operations of the federal courts, should at least await a case in which a resolution of the question is necessary to the determination of the controversy before it. It should not reach out to address the question in dictum when the answer is wholly irrelevant to the outcome of the case before it. The panel's overreaching is particularly egregious in this case because the linchpin provision on which it relied in pronouncing that Arizona had successfully opted-in to Chapter 154's short-fuse procedures had never been effectively implemented and had already been removed from the state's statutory schemefacts that the panel opinion does not even mention.

Not only has the panel reached out to address a novel, complex, and important issue in an advisory opinion based on a no-longer-existent provision of state law, Arizona's statutory scheme failed (and continues to fail) to provide for the reasonable compensation of post-conviction counsel in capital cases and failed (and continues to fail) to establish a mechanism for the appointment *of competent* counsel for all indigent capital prisoners. Thus, Arizona did not (and still does not) have sufficient procedures to qualify for opt-in status under Chapter 154. While the panel opinion does not purport to hold that Arizona's current procedures entitle it to opt-in status (and clearly they do not), the dictum announced in the advisory portion of the opinion is capable of creating considerable confusion and uncertainty for future courts that may be asked to consider and apply it. For that reason and the others discussed above, I respectfully dissent from my colleagues refusal to re-hear this case en banc.

Statement of Judge **KOZINSKI,** with whom Circuit Judges **O'SCANNLAIN, T.G. NELSON, GRABER** and **TALLMAN** join, concerning the denial of the petitions for rehearing en banc:

For the second time in eight months, judges of this court have advised the public and the other courts of this circuit to ignore portions of an opinion that commands a majority of the panel that decided it. *See also United States v. Johnson,* 256 F.3d 895, 921 (9th Cir. 2001) (Tashima, J., concurring) ("Because they are, in fact, *dicta* subsequent panels are not bound either by [the majority's] self-proclaimed 'holding' or by [its] purported 'overruling' of our prior cases."). For the reasons I explained in *Johnson,*256 F.3d at 914-16, this is a dangerous practice that will cause no end of confusion and disarray in our circuit case law.

Judge Reinhardt, like Judge Tashima in *Johnson* argues that a portion of the majority opinion here is "dicta" or "unnecessary" or "an advisory opinion," Dissent at 4499, but adds flourishes of his own. *See* Dissent at 4495-96 (the opinion "has no legal effect [and] should simply be ignored and allowed to die a quiet death "); *id.* ("neither we, nor any other court is bound by the panel's advisory declarations in this case"). Whether the portion of the opinion with which Judge Reinhardt disagrees is indeed unnecessary is highly debatable. When a court is confronted with two successive questions, it may legitimately proceed in one of two ways: (1) Decide Question 1 first and then, depending on the outcome, decide Question 2; or (2) if the answer to Question 2 is dispositive, proceed to answer that question only and bypass Question 1.

Which of these paths to follow is within the broad discretion judges have in constructing written opinions. Contrary to Judges Reinhardt and Tashima, judges are not bound to skip over any and all issues that might, after full adjudication, appear unnecessary. Not only is there no universal agreement as to what is and is not necessary to decide a particular case, but there can be very good reasons to resolve issues that, after all is said and done, turn out not to have been strictly necessary to the outcome. One such reason is that, in preparing for a case, it is not always obvious which issues need to be decided and

which do not. Judges therefore have to study and analyze various questions of law that may turn out not to matter in the end. In fact, not until an opinion is written, and all judges have joined or written separately, can one be certain that resolution of a particular issue is unnecessary to the outcome. Is judicial efficiency and stability better served by discarding this judicial work product, or by leaving it in the opinion, thereby saving future judges and litigants the burden and uncertainty of ploughing the same legal ground? Judges may well answer this question differently in different circumstances, but neither answer is always the more correct or legitimate one. Our caselaw is replete with examples where we have addressed successive questions, instead of assuming the first one away. *See. e.g., Braunling v. Countrywide Home Loans. Inc.*, 220 F.3d 1154, 1157-58 (9th Cir. 2000) (holding that the plaintiff qualified as "disabled" under the Americans with Disabilities Act, but then finding no liability because the plaintiff failed to show that the defendant could reasonably accommodate her disability); *United States v. Chon*, 210 F 3d 990, 993-94 (9th Cir. 2000) (holding that the Posse Comitatus Act applies to the Naval Criminal Investigative Service, but then holding that the Service's actions did not violate the statute). *See also Johnson*, 256 F.3d at 914-15 & nn.6&7.

In some situations, assuming the first step away may not even be appropriate. When we did so in *Katz v. United States*, 194 F 3d 962 (1999), the Supreme Court told us that we erred. *See Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). In *Katz*, we had dispensed with the initial inquiry into whether a constitutional right has been violated on the assumption that such inquiry is duplicative of the subsequent qualified immunity analysis, and instead proceeded directly to whether the constitutional right was clearly established. *Katz*, 194 F 3d at 967-69. The Supreme Court told us that, although the initial inquiry may not prove determinative, it is nevertheless indispensable because it might require the court "to set forth principles which will become the basis for a holding that a right is clearly established." *Saucier*, 121 S. Ct. at 2155-56.

Nor does labeling Part One of the opinion as "advisory," *See*

Dissent at 4497, deprive it of precedential force. Whether an opinion presents a live controversy is a jurisdictional question that must be decided by the court while the case is pending. When the court renders a judgment on the merits, this adjudicates all possible jurisdictional objections, including that the opinion is advisory, and precludes subsequent jurisdictional challenges. *See Ins. Com. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) (citing *ChicotCounty Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)). Judge Reinhardt may disagree with the panel's decision that it faced a live controversy, but that does not change the fact that the panel has resolved the issue and rendered an opinion that is binding as law of the case and law of the circuit.

Whether a court ought to speak to an issue that is not strictly necessary to the outcome of the case is a legitimate topic of debate during the process of collegial deliberation. Judges may choose not to join opinions that contain what they see as dicta, or the court may choose to take a case en banc when a panel strays into areas that are best left unexplored. But it is quite a different matter to suggest, as do Judges Reinhardt and Tashima, that the work product of a panel of this court can simply be disregarded because a later panel finds a way to call it "dicta" or "advisory" or some similar invective.

As I explained in *Johnson*, so long as the issue is presented in the case and expressly addressed in the opinion, that holding is binding and cannot be overlooked or ignored by later panels of this court or by other courts of the circuit. *Johnson*, 256 F.3d at 915-16. This principle is well entrenched in our nation's jurisprudence. The Supreme Court made this absolutely clear over a century ago in *Railroad Companies v. Schutte*, 103 U.S. 118, 143 (1880), when it stated as follows:

> It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly

> presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

If a judge of our court disagrees with a portion of a published opinion, the proper remedy is to call for en banc, not to undermine it with rhetoric. Lawyers find it hard enough to figure out the law by reading our opinions; it is unwise and inappropriate to make this task harder still by suggesting that some of what purports to be a holding in those opinions can simply be ignored.

Part One of the panel's opinion clearly addresses an issue presented by the parties, and does so deliberately and purposefully. *See Spears v. Stewart*, 267 F.3d 1026, 1030-41 (9th Cir. 2001). The opinion was tested during the en banc process and put to a vote of the full court. One can safely assume that what Judge Reinhardt says in his dissent was known to the court, yet a majority of the judges did not vote to rehear the case. Regardless of what Judge Reinhardt may say, this opinion is now the law of the circuit, and will remain so until and unless overruled by the Supreme Court or by an en banc panel in a later case. Let no one be misled by Judge Reinhardt's ruminations to the contrary.

OPINION

GRABER, Circuit Judge:

In this interlocutory appeal, we have agreed to answer the following question: "whether Arizona, as of July [17], 1998,[1] qualified to opt-in

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1. The certified question used the date July 11, 1998. That appears to be a typographical error; in its order, the district court analyzed whether Arizona had attained opt-in status as of July 17, 1998, the date (continued...)

to Chapter 154, Special Habeas Corpus Procedures in Capital Cases, 28 U.S.C. §§ 2261-2266," a part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We hold that Arizona's mechanism for the appointment of counsel for indigent capital defendants in state post-conviction proceedings met the requirements of Chapter 154 and, accordingly, qualified for opt-in status as of that date. However, we also hold that Arizona is not entitled to enforce the procedures of Chapter 154 in this case, because it did not comply with the timeliness requirement of its own system with respect to Petitioner.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Anthony Marshall Spears was convicted of first-degree murder and theft and was sentenced to death in 1992. The Arizona Supreme Court affirmed Petitioner's convictions and sentence on direct appeal on January 4, 1996. The Supreme Court of the United States denied certiorari on November 4, 1996. The Arizona Supreme Court neither issued a mandate nor appointed post-conviction counsel at that time, because no willing and qualified lawyers were available to serve.

Petitioner filed his first federal habeas petition pro se on April 11, 1997. He was concerned that his delay in initiating state-court collateral proceedings would affect adversely his ability to seek federal habeas relief. The district court consolidated Petitioner's case with those of 16 other Arizona capital defendants. On March 5,1998, the court dismissed all the applications for federal habeas relief, without prejudice, for failure to exhaust state remedies. The court also held that none of the limitations periods was running with respect to the capital defendants. On August 22, 1997, almost a year and eight months after the Arizona Supreme Court had affirmed Petitioner's conviction and sentence, and about ten months after the Supreme Court of the United States had

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1. (...continued)
on which Petitioner's post-conviction counsel was appointed. The mistake is immaterial because the statutes and Arizona Supreme Court rules that formed Arizona's opt-in system were in effect on both dates.

denied certiorari, the Arizona Supreme Court issued the mandate in Petitioner's case and appointed Jess Lorona as Petitioner's counsel for state post-conviction proceedings. On November 26, 1997, the Arizona Supreme Court granted Lorona's motion to withdraw, at the same time recalling the mandate in Petitioner's case. On July 17, 1998, the court re-issued the mandate in Petitioner's case and, again, appointed Lorona as counsel for Petitioner.

Petitioner filed his petition for state post-conviction relief on January 28, 1999, 195 days after Lorona was re-appointed. The Arizona trial court denied the petition. On May 23, 2000, the Arizona Supreme Court denied Petitioner's petition for review. Two days later, it issued the warrant for his execution.

Petitioner filed the habeas petition underlying this interlocutory appeal on June1, 2000. The next day, the district court granted Petitioner's application for a stay of execution. Respondent Terry Stewart, Director of the Arizona Department of Corrections, moved to dismiss the petition as untimely, arguing that Arizona is an "opt-in" state under 28 U.S.C. § 2261 and that Petitioner's petition was time-barred by the 180-day limitations period in 28 U.S.C. § 2263. The court denied Respondent's motion, holding that Arizona's mechanism for the appointment of counsel in capital cases failed to meet the criteria of § 2261.[2] The district court certified an interlocutory appeal to this court to review its determination that Arizona failed to qualify as an opt-in state at the time counsel was appointed for Petitioner.

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2. Specifically, the court held that (1) July 17, 1998, was the relevant date for determining whether Arizona met the requirements of Chapter 154 for the purpose of Petitioner's case and that (2) Arizona's system provided (a) for the payment of reasonable litigation expenses and (b) adequate competency standards for appointed counsel. However, the court concluded that Arizona's offer of counsel did not comply with 28 U.S.C. § 2261 in other respects.

STANDARD OF REVIEW

We review de novo the district court's legal conclusions concerning compliance with Chapter 154 of AEDPA. *Ashmus v. Woodford,* 202 F.3d 1160, 1164 (9th Cir.), *cert. denied.* 531 U.S. 916 (2000). We review the district court's factual findings for clear error. *Id.*

DISCUSSION

1. *Whether Arizona's Mechanism for the Appointment of Post-Conviction Counsel for Indigent Capital Defendants Combined with 28 U.S.C. 62261 as of July 17, 1988*

A. *Chapter 154 of AEDPA*

[1]Chapter 154 of AEDPA provides a state with procedural benefits in federal habeas cases filed by capital defendants if the state has "opted in" to its provisions. 28 U.S.C. §§ 2261-2266; *Ashmus,* 202 F.3d at 1163. A state with a post-conviction procedure can opt in by establishing a system for the appointment of counsel to represent capital defendants in state post-conviction proceedings.[3] 22 U.S.C. § 2261; *Ashmus.* 202 F.3d at 1162 n.3. That system must (1) be established by a "Statute, rule of its court of last resort, or by another agency authorized by State law," 28 U.S.C. § 2261(b); (2) "offer counsel to all State prisoners under capital sentence," § 2261(c); (3) compensate counsel and pay reasonable litigation expenses, § 2261(b); (4) contain standards of competency for appointed counsel in the statute or court rule, § 2261(b); and (5) provide for the entry of a court order that (a) appoints counsel upon finding either that the defendant is indigent and

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3. A state with a "unitary review" system can opt in under 28 U.S.C. § 2265. A unitary review system is one in which "a petitioner is permitted to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack " *Ashmus*, 202 F.3d at 1162 n3 (quoting 28 U.S.C. § 2265(a) Arizona does not have a unitary system.

accepts the offer of counsel *or* that the defendant is unable competently to accept or reject the offer, § 2261(c)(1); (b) finds that the defendant declined the offer of counsel with an understanding of its legal consequences, § 2261(c)(2); or (c) denies the appointment of counsel upon finding that the defendant is not indigent, § 2261(c)(3).

A state with a qualifying system for the appointment of counsel receives procedural benefits under Chapter 154. 28 U.S.C. §§ 2263, 2266; *Ashmus,* 202 F.3d at 1163. First, a capital defendant must file a federal habeas petition within "180 days after formal State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2263(a).[4] Second, the district court must render a decision on the habeas application within 180 days after the date it is filed, and the district court may not extend the period by more than 30 days. § 2266(b)(1)(A) & (b)(1)(C)(i). Third, the court of appeals must decide any appeal from the district court's decision within 120 days after briefing is completed. § 2266(c)(1)(A).

The petitioner receives the benefit of an automatic stay of execution. 28 U.S.C. § 2262. Upon receiving the order granting or denying counsel under a system in compliance with § 2261, the petitioner may apply to any federal district court for an automatic stay of execution, which remains in place throughout all state-court collateral proceedings and federal collateral proceedings, provided that the petitioner meets all other procedural requirements. § 2262.

B. *Arizona's System for the Appointment of Post-Conviction Counsel*

Respondent contends that two statutes, Arizona Revised Statutes (ARS) §§ 13-4041 and 13-4013, and a rule of criminal procedure, Arizona Rule of Criminal Procedure (Rule) 6.8, together comprised a

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4. If a state has not opted in, a defendant's petition is governed instead by the one-year limitations period in 28 U.S.C.§ 2244.

mechanism for the appointment of counsel that complied with the requirements of Chapter 154 as of July 17, 1998. The Arizona legislature and supreme court promulgated ARS § 13-4041 and Rule 6.8 with the express intention of complying with Chapter 154.[5]

The relevant portions of ARS § 13-4041, which were in effect on July 17, 1998, provided:[6]

> B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court, or if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state post-conviction relief proceeding. Counsel shall meet the following qualifications:
>
> 1. Membership in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
>
> 2. Practice in the area of state criminal appeals or post-conviction proceedings for at least three years immediately preceding the appointment.
>
> 3. No previous representation of the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued

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5. That fact distinguishes this case from several previous cases, in which states sought to opt in to Chapter 154 by relying on procedures that antedated AEDPA. *See, e.g., Ashmus v. Woodford,* 202 F.3d 1160 (9th Cir.) (California), *cert. denied,* 531 U.S. 916 (2000); *Mata v. Johnson,* 99 F.3d 1261 (5th Cir. 1996) (Texas), *vacated in part on other grounds* 105 F.3d 209 (5th Cir. 1997); *Scott v. Anderson,* 958 F. Supp. 330 (N.D. Ohio 1997) (Ohio); *Wright v. Angelone,* 944 F. Supp. 460 (E.D. Va. 1996) (Virginia).

6. This version of the statute remains in effect today.

representation and waive all potential issues that are foreclosed by continued representation.

C. The supreme court shall establish and maintain a list of qualified candidates. In addition to the qualifications prescribed in subsection B of this section, the supreme court may establish by rule more stringent standards of competency for the appointment of post-conviction counsel in capital cases. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under subsection B of this section or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel pursuant to subsection B of this section from the list.

D. Notwithstanding subsection C of this section, the court may appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:

1. No counsel meets the qualifications under subsections B and C of this section.

2. No qualified counsel is available to serve.

E. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.

F. If at any time the trial court determines that the capital defendant is not indigent, appointed counsel shall no longer be compensated by public monies and may withdraw.

G. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state post-conviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition is filed. ...

. . . .

H. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection G of this section by paying an hourly rate in an amount that does not exceed one hundred dollars per hour. The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings. The court shall review and approve additional reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent over the two hundred hour threshold are unreasonable, the attorney may file a special action with the Arizona supreme court . . .

. . . .

J. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.

In response to the directive in ARS § 13-4041, the Arizona Supreme Court adopted Rule 6.8, 17 Ariz. Rev. Stat. R. Crim. P. 6.8, "Standards for Appointment of Counsel in Capital Cases." On July 17, 1998,[7] that rule provided, in pertinent part:

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7. An amended version of the rule took effect on June 1, 2000. Ariz. R. Crim. P. 6.8 (2001).

a. General. To be eligible for appointment in a capital case, an attorney

(1) Shall have been a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;

(2) Shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and

(3) Shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

. . . .

c. Appellate and Post-Conviction Counsel. To be eligible for appointment as appellate or post- conviction counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

(1) Within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.

(2) Have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training

or educational programs in the area of capital defense.

d. Exceptional Circumstances. In exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(l) and (2), (b) and (c) of this rule, providing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.

Additionally, ARS § 13-4013(B) provided, on July 17, 1998,[8] for the compensation of expert witnesses and investigators in capital proceedings:

> When a person is charged with a capital offense the court. ..shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial and at any subsequent proceeding. Compensation for such investigators and expert witnesses shall be such amount as the court in its discretion deems reasonable and shall be paid by the county.

Although Respondent has not cited them, we identify three other provisions of Arizona law that were relevant to the appointment of post-conviction counsel on July 17, 1998. First, ARS §13-4234(D) governed[9] *when* post-conviction counsel had to be appointed:

In capital cases, on the issuance of a mandate affirming the

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8. The same wording remains in force today.

9. The statute remains in the same form today.

> defendant's conviction and sentence on direct appeal, the clerk of the Supreme Court expeditiously shall file a notice of post-conviction relief with the trial court. On the first notice in capital cases, a defendant has sixty days from the filing of the notice in which to file a petition. The supreme court shall appoint counsel pursuant to § 13-4041, subsection B.

Rule 31.23(b)(1), in turn, governed[10] the timing of the issuance of the mandate in a capital case:

> The clerk of the Supreme Court shall issue the mandate in capital cases when the time for filing a petition for a writ of certiorari in the United States Supreme Court from the decision affirming the defendant's conviction and sentence on direct appeal has expired, or, in a case in which a petition for writ of certiorari has actually been filed, when the clerk of the Supreme Court is notified by the United States Supreme Court that the petition has been denied.

Finally, Rule 32.4(c) reconfirmed[11] Arizona's obligation under ARS § 13-4234 to appoint counsel upon the issuance of the notice of post-conviction relief:

> Upon the filing of a timely notice in a capital case, ...the presiding judge shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent.

C. *Burden of Proof*

Respondent bears the burden of proving that Arizona's mechanism for the appointment of counsel complied with § 2261. *Ashmus,* 202

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10. The rule remains in the same form today.

11. The Arizona Supreme Court amended this rule in 2000. *See* Ariz. R. Crim. P. 32.4 (2001).

F.3d at 1164-65. Arizona must "affirmatively establish[] that it satisfie[s] each condition in the federal statute." *Id.* at 1164.

D. *The Opt-In Requirements*

[2] The parties do not dispute that the Arizona mechanism provided for the entry of an appropriate court order as required by 28 U.S.C. § 2261(c). On its face, it did. *See* Ariz. Rev. Stat. § 13-4041 (B), (E) & (F) (providing that counsel will be appointed by the supreme court, or other court authorized by the supreme court). Neither do the parties dispute that the system met the criterion of § 2261 that it be embodied in either statutes or supreme court rules.[12] Accordingly, we address only whether the other requirements of § 2261 were met, namely, whether the system provided (1) mandatory and binding competency standards for appointed counsel, (2) reasonable compensation for appointed counsel, (3) payment of reasonable litigation expenses, and (4) an offer of post-conviction counsel to all capital defendants.

(i) *Competency Standards*

To obtain the benefits of Chapter 154, Arizona "must provide standards of competency." 28 U.S.C. § 2261(b). Those standards must be "binding and mandatory." *Ashmus,* 202 F.3d at 1167 (construing the identical text in § 2265(a). The legislative history of Chapter 154

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12. Amici argue that Arizona was required to contain its appointment system in a single statute or supreme court rule. There is nothing in the federal law that prohibits a state from establishing its system in both statutes and supreme court rules, so long as that system is coherent. *See, e.g., Ashmus v. Calderon,* 31 F. Supp. 2d 1175, 1183 n.12 (N.D. Cal. 1998) ("Although a single statute or rule of court is not required, a *system* must be affirmatively established and readily discernable. ..." (emphasis in original)), *aff'd,* 202 F.3d 1160 (9th Cir.), *cert. denied,* 531 U.S. 916 (2000). This case does not present a situation in which the laws involved are found in many out-of-the-way places so as to be inaccessible or incoherent.

clarifies that Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards. 137 Congo Rec. S3191-02, S3220 (daily ed. Mar. 13, 1991) ("The latitude afforded to the states in defining specific standards of counsel competence is also desirable in a new procedure of this type, and would enable all states to learn from experience concerning the most effective means of ensuring competent representation through the exploration of different approaches."). The Arizona system met this requirement of Chapter 154.

Rule 6.8 established clear qualifications for post-conviction counsel. A lawyer must have been a member in good standing of the Arizona bar for five years or more, must have had recent experience in criminal litigation, and must have demonstrated sufficient proficiency and commitment to handle a capital case. Ariz. R. Crim. P. 6.8(a). Additionally, the lawyer must have had a combination of appellate and post-conviction experience involving felony and murder convictions, and the lawyer also must have participated in recent educational programs on capital defense. Ariz. R. Crim. P. 6.8(b) & (c).

Although subsection (d) of Rule 6.8 authorized the appointment of counsel who did not meet the precise qualifications listed in the rule, this feature did not make the competency standards any less mandatory or binding. The rule required that the qualifications of any lawyer appointed who did not meet the specific criteria of 6.8(a) *"significantly exceed[ ]"* the standards provided by 6.8(a) *and* that the lawyer associate with one who *did* meet the precise qualifications listed in 6.8(a). Ariz. R. Crim. P. 6.8(d) (emphasis added).[13] That is, in *every* case. at least *one* lawyer who met all the listed criteria must have been appointed and involved in the case. Morever, nothing in the text of § 2261 prohibits a state from adopting two sets of alternative, but

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13. This provision would allow, for example, an excellent capital-defense lawyer from another jurisdiction to associate in an appropriate case.

equivalent competency standards. It is clear that this mechanism ensured that all indigent capital defendants in Arizona were represented in state post-conviction proceedings by counsel who were, at a minimum, as competent as lawyers who met the standards provided in Rule 6.8(a).

Amici argue that Arizona's competency standards were insufficient because they permitted the appointment of a lawyer with no experience defending a capital case. *See* Ariz. R. Crim. P. 6.8(c)(2) (1998) ("Alternatively, an attorney may have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings."). We are not persuaded.

Nothing in 28 U.S.C. § 2261(b) or in logic requires that a lawyer must have capital experience to be competent. Arizona's other standards ensured that appointed counsel will possess the capability to handle the post-conviction phase of a capital case. For example, Rule 6.8(c)(3) provided that, to be appointed, a lawyer "[s]hall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." Additionally, Rule 6.8(c)(2) required that a lawyer "[h]ave attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense."[14]

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14. Amici argue that this provision should be construed to have authorized the appointment of counsel with no relevant training in capital defense, so long as the appointee agreed to meet the educational requirement within a year after appointment. However, the plain text of the rule did not permit a conditional appointment of counsel. It spoke in the past tense: As a *prerequisite* to appointment, the lawyer must "*[h]ave* attended and successfully completed" the CLE requirements, just as the lawyer must "*have* demonstrated the necessary proficiency." (Emphasis added.) Further, the context of the rule weighs against

(continued...)

Petitioner argues further that ARS § 13-4041 (D) eviscerated the competency standards established by Rule 6.8 and by ARS § 13-4041(C), defeating any claim by the State that the standards are mandatory. We do not read the statute in that manner. The text of ARS § 13-4041 (D) made discretionary the court's power to appoint counsel who did not meet the qualifications established by statute or rule:

> Notwithstanding subsection C of this section, the court *may* appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:
>
> 1. No counsel meets the qualifications of subsections B and C of this section.
>
> 2. No qualified counsel is available to serve.

(Emphasis added.) However, in promulgating Rule 6.8, the Arizona Supreme Court formally chose not to invoke that discretion. That is, the court bound itself by Rule 6.8 to appoint counsel in capital cases whose

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14. (...continued)
amici's construction. Under Rule 32.4, an appointed lawyer had at most 120 days to initiate post-conviction proceedings. In view of that abbreviated time line, it simply would not make sense to read the rule to permit a lawyer to complete the required CLE courses up to a year following appointment, when the knowledge was needed so soon after appointment.

We acknowledge that the ad hoc committee appointed by the Arizona Supreme Court to identify Arizona lawyers meeting the standards of Rule 6.8 interpreted the rule in the manner advocated by amici. However, in view of the facts that the Arizona Supreme Court itself never adopted that reading and that it does not comport with the text of the rule, we respectfully disagree with that interpretation.

As noted earlier, Rule 6.8 was amended in 2000.

qualifications met the competency standards listed therein.

Even if the statute and the rule were inconsistent, under Arizona law, the statute gives the court the authority to determine whether subsection C is controlling, which the court has determined it is. Thus, Rule 6.8 controlled over ARS § 13-4041(D). Also, in Arizona the regulation of " 'the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in' "the Arizona Supreme Court.[15] *In re Creasy*, 12 P.3d 214, 216 (Ariz. 2000) (quoting *In re Smith*, 939 P.2d 422,424 (Ariz. 1997). Although the legislature may, by statute, regulate the practice of law, a court rule governing the practice of law "trumps statutory law." *Id.* at 219; *see also State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P .2d 1, 14 (Ariz. 1961) (en banc), *opinion supplemented* 371 P.2d 1020 (Ariz. 1962) (en banc). Rule 6.8 straightforwardly regulated the practice of law in Arizona by establishing qualifications for court-appointed counsel in capital post-conviction proceedings. Consequently, it "trumped" ARS § 13-4041(D) to the extent that the Statutory provision could be read to establish or permit lesser qualifications for post-conviction counsel in a capital case.

In short, the Arizona system for the appointment of post-conviction counsel provided mandatory and binding competency standards on July 17, 1998. Therefore, it complied with 28 U.S.C. § 2261 in that respect.

(ii) *Compensation*

Arizona compensated court-appointed lawyers at "an hourly rate

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15. We note that this principle --that a state supreme court possesses the exclusive authority to regulate the practice of law within its jurisdiction -- is not unique to Arizona, but is a principle of blackletter law embraced by many states. Restatement (Third) of Law Governing Law § l, cmt. c (1998).

of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition [was] filed." Ariz. Rev. Stat. § 13-4041(G). Additionally, on a showing of "good cause," defined to include "that the attorney spent over two hundred hours representing the defendant in the proceedings," the court was required to compensate an appointed lawyer at a rate not to exceed $100 an hour. *Id.* § 13-4041(H).

Petitioner argues that a 200-hour presumptive limit does not satisfy the requirement of reasonable compensation. He contends that it is common for post-conviction counsel to spend more than 200 hours on a case and that it is reasonable to require counsel to demonstrate good cause to obtain fees for more than 200 hours. Again, we are not persuaded.

Section 2261 merely requires that a state establish"a mechanism for the ...compensation. ..of competent counsel." 28 U.S.C. § 2261(b). ARS § 13-4041 provided the necessary mechanism for compensation. The statute authorized compensation for appointed counsel at a rate of up to $100 an hour, a rate that neither Petitioner nor amici argue was unreasonable. If the court set a rate at less than $100 an hour, and counsel believed that the rate was unreasonable, the statute provided a remedy: a special action in the Arizona Supreme Court. Ariz. Rev. Stat. § 13-4041(H).

With respect to the number of hours to be compensated, the 200-hour threshold in no way limited the amount of compensation that post-conviction counsel could receive. By the plain terms of the statute, the court was *required* to compensate a lawyer for hours worked beyond 200, provided only that it did not find them unreasonable.

Contrary to Petitioner's argument, such a compensation mechanism is not, on its face, unduly burdensome to appointed counsel. By the terms of the statute, to receive compensation for hours beyond the threshold, the lawyer needed only to establish that he or she worked more than 200 hours on the case and that the time expended was reasonable. Ariz. Rev. Stat. § 13-4041(H). The simple requirement to

account for hours spent is a regular feature of fee requests in almost all criminal and civil contexts in which attorney fees are recoverable from the state or from another party. Indeed, the same requirement exists when a lawyer bills a client. Nothing in Chapter 154 suggests that the mechanism to ensure compensation must be a blank check. The statute simply requires that the appointment mechanism reasonably compensate counsel. Thus, consistent with § 2261, a state can require an appointed lawyer to account for the reasonableness of the number of hours worked before it compensates that lawyer.

We conclude that Arizona's compensation mechanism complied with Chapter 154 on July 17, 1998.

(iii) *Litigation Expenses*

Amici argue that the district court erred in concluding that the Arizona mechanism provided for the payment of reasonable litigation expenses as of July 17, 1998. It did not.

By its terms, ARS § 13-4041 (H) required the payment of "reasonable fees and costs." To the extent that ARS § 13- 4041 (H) could not be read to include fees for investigators and expert witnesses, ARS § 13-4013(B) mandated the payment of such reasonable fees in capital proceedings involving indigent defendants. Therefore, the district court did not err in concluding that Arizona's appointment system provided for the payment of reasonable litigation expenses.

Amici rely on *Chaney v. Stewart,* 156 F.3d 921 (9th Cir. 1998). There, we concluded that, under ARS § 13-4013(B), "the trial court has broad discretion to determine whether reasonable necessity has been demonstrated." *Id.* at 925. Amici argue that this holding means that ARS § 13-4013 did not provide for the mandatory payment of reasonable expert and investigator fees. But *Chaney* discussed only whether the appointment and compensation of experts and investigators was mandatory under ARS § 13-4013 in *all* capital cases (whether or not they were reasonably necessary). *Id.* It did not discuss whether the statute mandated compensation for experts and investigators who *were*

"reasonably necessary. " Although the trial court had discretion to assess the reasonableness of the need for services or the amount of fees, once the court determined that investigative or expert services were "reasonably necessary," the text of the statute *required* that the court pay reasonable fees for them.

Title 28 U.S.C. § 2261 (b) requires only that the state mechanism provide for the payment *of reasonable* litigation expenses. The federal statute thus assumes that a state can assess reasonableness as part of its process. The Arizona system met this criterion as of July 17, 1998, by *requiring* the payment of reasonable costs, as well as reasonable fees to investigators and experts, whenever the court deemed them reasonably necessary.

(iv) *Arizona's Offer of Post-Conviction Counsel*

The district court held that Arizona's offer of post-conviction counsel did not comply with 28 U.S.C. § 2261 because there was substantial delay in the appointment of counsel in Petitioner's case, as well as in the cases of other similarly situated capital defendants. We disagree. Although we conclude later that Arizona's delay in appointing post- conviction counsel for Petitioner precludes it from benefitting from Chapter 154 in this case, on its face Arizona's offer of counsel met the requirements of § 2261.

(a) *The Federal Requirements for an Offer of Counsel*

Title 28 U.S.C. § 2261 requires that a state offer and appoint post-conviction counsel to all indigent capital defendants whose "convictions and sentences have been upheld on direct appeal to the court of last resort." 28 U.S.C. § 2261(b) & (c). It permits the state to decline to appoint counsel only upon a judicial finding that a capital defendant is not indigent, or that a capital defendant voluntarily and competently has declined counsel. *Id.* § 2261(c).

Although the text of the statute does not specify how soon after affirmance of a defendant's conviction and sentence the state must

extend its offer of post-conviction counsel, the context of 28 U.S.C. § 2261, as well as the legislative history of Chapter 154, make it clear that Congress intended that a State extend the offer expeditiously. First, § 2263 states that the limitations period for filing a federal habeas petition in an opt- in state begins to run "after final State court affirmance of the conviction and sentence on direct review," although the time period is tolled during the time a petition for certiorari is pending in the U.S. Supreme Court. Significantly, the statute does *not* provide for the period to be tolled during the time a petitioner is awaiting appointment of counsel. *See* 28 U.S.C. § 2263 (identifying the bases for tolling the limitations period: (1) pending a petition for certiorari in the Supreme Court; (2) pending state post-conviction proceedings; and (3) good cause (for "an additional period not to exceed 30 days, " provided that appropriate motions are made)). That the time for filing a federal habeas petition begins running at the conclusion of the direct appeal, and continues to run even though no counsel has been appointed, implies that Congress intended the states to act quickly in appointing counsel under Chapter 154 and to extend the offer of post-conviction counsel by a time shortly after certiorari is denied by the Supreme Court, in order to ensure that a petitioner -through counsel-- commences state post-conviction proceedings before the expiration of the 180-day federal period.

The legislative history confirms that counsel is to be appointed expeditiously. One of the two primary ills that Congress sought to cure through Chapter 154 was needless delay in the context of capital collateral relief. 135 Congo Rec. S13471-04, S13482 (finding "unnecessary delay" to be a "serious problem" in capital collateral review). To resolve the problem of delay, Chapter 154 not only imposes the burden on a capital defendant to file a federal habeas petition half a year earlier than in non-opt-in states, but also imposes substantial burdens on the federal courts by requiring them to review and resolve opt-in petitions under mandatory, expedited time lines. 28 U.S.C. § 2266. As we recognized in *Ashmus v. Calderon,* 123 F.3d 1199, 1208

(9th Cir. 1997),[16] *rev'd on other grounds,* 523-U.S. 740, *vacated.* 148 F.3d 1179 (9th Cir. 1998), to permit a State to take advantage of the expedited review procedures in Chapter 154, when the state itself is untimely in meeting its obligation to appoint counsel, would undermine the purpose of Chapter 154, 123 F.3d at 1208 ("California may not take advantage of the six-month limitations period when it takes years to appoint counsel."); *see also Hill v. Butterworth,* 941 F. Supp. 1129, 1145-47 (N.D. Fla. 1996) (holding that Chapter 154 required the appointment of counsel immediately upon the conclusion of the state proceedings on direct appeal), *vacated on other grounds,* 147 F.3d 1333 (11th Cir. 1998).

In summary, to comply with Chapter 154, a state must offer counsel to all indigent capital defendants shortly after the later of (1) the conclusion of the defendant's direct appeal in state court or (2) the Supreme Court's disposition of the defendant's petition for certiorari.

(b) *Arizona's Offer of Counsel*

We conclude that the Arizona statutory mechanism for the appointment of post-conviction counsel in effect on July 17, 1998 (1) offered counsel to all indigent capital defendants (2) in a timely fashion.

A.R.S § 13-4041 *mandated* the appointment of post-conviction counsel for *every* capital defendant once the Arizona Supreme Court had affirmed the defendant's conviction and sentence. Ariz. Rev. Stat. § 13-4041 (B). Consistent with § 2261, the state was freed from its obligation to provide post-conviction counsel *only* upon a judicial finding that a defendant (1) was not indigent or (2) competently had waived the appointment of counsel. *Id.*

A review of the appointment mechanism reveals that it required an

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16. Vacated opinions remain persuasive, although not binding, authority. *Roe v. Anderson,* 134 F.3d 1400, 1404 (9th Cir. 1998), *affd sub nom. Saenz v. Roe,* 526 U.S. 489 (1999).

expeditious appointment of counsel. Rule 31.23(b) provided that the mandate in a capital case "shall issue" either (1) when the Supreme Court of the United States denied certiorari or (2) when the period for filing a petition for a writ of certiorari (90 days under U.S. Sup. Ct. R. 13) expired.[17] In turn, the issuance of the mandate affirming the conviction and sentence of a capital defendant triggered an automatic filing of the notice of post-conviction review. Ariz. Rev. Stat. § 13-4234(D) ("In capital cases, on the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal, the clerk of the supreme court expeditiously shall file a notice of post-conviction relief with the trial court."). Finally, the filing of the notice of post- conviction relief initiated Arizona's obligation to appoint counsel within fifteen days. As of July 17, 1998, Rule 32.4(c) provided in part:

> Upon the filing of a timely notice in a capital case, in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time raises a claim of ineffective assistance of counsel, the presiding judge shall appoint counsel within **15** days if requested and the defendant is determined to be indigent.

Ariz. R. Crim. P. 32.4(c) (1998).[18] Thus, the Arizona system contemplated that post-conviction counsel would be appointed by a date within fifteen days following the issuance of the notice of post-conviction relief, which, itself, would issue "expeditiously" upon either (1) the Supreme Court's denial of certiorari or (2) the expiration of the 90-day period for filing for certiorari.

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17. The text of the rule did not provide for any delay in the issuance of the mandate.

18. We read the mandate in A.R.S § 13-4041 that post-conviction counsel be appointed for all capital defendants as a request for counsel made by the Arizona legislature on behalf of all capital defendants, triggering the fifteen-day appointment period under Rule 32.4(c) upon the automatic filing of the notice of post-conviction relief.

Thus, in a normal capital case governed by the Arizona rules, post-conviction counsel should have been appointed within fifteen days after the Supreme Court denied certiorari, or after the 90-day period for filing for certiorari expired. That time line was sufficient to meet the requirements of Chapter 154.

2. *Whether Chapter 154 Applies to This Case*

[3] We have concluded that, as of July 17, 1998, Arizona, through statutes and supreme court rules, had established a system that, on its face, entitled the state to opt in to the procedures of Chapter 154. The question remains, however, whether Respondent can invoke opt-in status in this case. We decide that he cannot.

[4] In order to receive the benefits of Chapter 154 in a particular case, a state must achieve two things. First, the state must have in place a system that meets the federal statutory criteria for the appointment of post-conviction counsel for indigent capital defendants. Second, the state must follow that system in essential particulars. We thus agree with the Fourth Circuit that Chapter 154 requires a state to provide more than just a system that meets the federal standard on paper. *Tucker v. Catoe,* 221 F.3d 600,604 (4th Cir.), *cert. denied,* 531 U.S. 1054 (2000). Instead, a state must appoint counsel in compliance with its own system before a federal court will enforce the Chapter 154 time line on its behalf in a particular case. *See id.* ("It would be an astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated pursuant to 28 U.S.C. § 2261.").

[5] Here, the Supreme Court denied certiorari on November 4, 1996. Yet, post-conviction counsel was not appointed for Petitioner until July 17, 1998 --a period of about one year and eight months. We read the Arizona system to have required the appointment of counsel, in a case of this kind, within fifteen days from the date on which the state issued the notice of post-conviction relief (which, in turn, was to issue once Arizona received notification of the denial of certiorari by the Supreme Court). Because timeliness is a requirement at the heart of the

post-conviction procedure, and the state failed utterly to meet the extant requirement, we hold that Arizona is not entitled to enforce the procedures of Chapter 154 in Petitioner's case.

CONCLUSION

We answer the district court's question on interlocutory appeal as follows: As of July 17, 1998, Arizona had established a mechanism for the timely appointment and compensation of post-conviction counsel in all capital cases, which facially complied with Chapter 154 of AEDPA. Nevertheless, because the appointment of counsel for Petitioner did not comply with the timeliness requirement of that mechanism, Arizona is not entitled to benefit from the expedited procedures in this case.

REMANDED; QUESTION ON INTERLOCUTORY APPEAL ANSWERED.